

MODERNISED AWARDS TAKING SHAPE FOR 2010

On 19 December 2008 the Australian Industrial Relations Commission published its blueprint for modernised awards pursuant to the Government's 'Forward with fairness' employee relations policy.

The decision prescribes model terms and conditions for 17 priority industries and occupations adding further substance to the Government's planned national safety net of minimum terms and conditions commencing on 1 January 2010. The National Safety Net includes the ten employment standards prescribed in the Fair Work Bill and the ten minimum conditions prescribed under modernised awards. The National Safety Net will also underpin the new system of enterprise bargaining.

Objectives of award modernisation

The 'modernisation' of over 4,000 federal awards was initiated under the changes made to the Workplace Relations Act 1996 ('the Act') in March 2008.

Section 576A of the Act provides that modernised awards must be *"...simple to understand and easy to apply, must be of a safety net character, must promote flexible modern work practices and efficient and productive workplaces and must be in a form that promotes collective bargaining."*

The brief delivered by the Minister for Workplace Relations, Julia Gillard to the Australian Industrial Relations Commission provided further guidance including:

"...the creation of modern awards is not intended to extend award coverage to classes of employees such as managerial employees, but modern awards may cover new industries or new occupations where the work is similar to work that has historically been performed subject to awards (including State awards). Nor are modern awards intended to cover high-income employees, disadvantage employees, increase costs for employers or result in the modification of enterprise awards."

Coverage of modernised awards

Employees and employers will no longer be 'bound' by federal awards. The employer (who must be a constitutional corporation if operating outside of

Victoria and the territories) will not be specifically listed as a respondent to the award. Rather they will be 'covered' by a modern award i.e. they will fall within the scope of the industry or occupational description by reference to the nature of their business.

A modern award will 'apply' to an employer where the rights and obligations are regulated by the award and not an enterprise agreement, a State award or where the employee earns more than \$100,000 per year or is award free.

Modern awards are to be either industry or occupational based instruments. However, the Commission has taken an unusual approach to its task. It has retained the Commission's industry panel system to define the coverage of industry awards rather than the internationally recognised Australian and New Zealand Standard Industry Classifications (ANZSIC) which makes the development of industry specific conditions potentially inconsistent with most economic and statistical measures.

Occupational based awards will apply to employers and employees that are not covered by industry based awards. For example, an employee performing clerical or administrative work will be covered by a clerical and administrative occupation award only if the industry award that their employer is covered by does not include clerical or administrative wage classifications.

Content of modernised awards

Modern awards may include terms relating to *minimum wages, types of employment, when work is performed, overtime rates, penalty rates, annualised wages and salaries, allowances, leave and leave loadings, superannuation and procedures for consultation, representation and dispute settlement.* The modern awards may also include provisions which describe the interaction with the proposed National Employment Standards.

The Commission has published model clauses applicable under most of these topics in the 17 priority areas. However, it has adopted some unusual and conservative positions including in respect of the annualised wages and salaries which it rejected as inappropriate, the cashing out of annual leave which has been consigned to enterprise bargaining, the inclusion of default superannuation funds which is grossly anti-competitive and the imposition of loadings and

penalty rates that ignores the results of ten years of enterprise bargaining.

The Commission's decision is littered with references to previous Commission decisions but does not cite any economic or other empirical research to justify its rather egocentric positions on these topics.

Award flexibility

Importantly the modernised awards will contain a model '*award flexibility*' clause that is supposed to allow individual employers and employees to agree on different arrangements to meet the genuine needs of the employer and an individual employee. One should remember that the idea of a clause to accommodate individual variations from award conditions arose from the political debate on the abolition of Australian workplace agreements.

True to form, the Commission has prepared a model clause with a focus predominately on the protection against disadvantage rather than the enabling of flexibility. As I suggested in the July 2008 edition of Employee Relations MONTHLY, there are serious limitations on how flexible such agreements can make the employment arrangements.

Firstly, the award terms which may be varied in a flexibility clause are limited to:

- Arrangements for when work is performed;
- Overtime rates;
- Penalty rates;
- Allowances; and
- Annual leave loading.

The flexibility clause was supposed to operate in parallel to the modern award clause that allowed the annualisation of wages, allowances and penalty rates. However, as I indicated above, the Commission has chosen not to include annualisation of salaries in modern awards unless the industry has a history of such.

Secondly, an agreement made pursuant to a flexibility clause may only be made after employment has commenced. A contract containing a flexibility clause may not be offered as a condition of employment. This is hard to understand as it potentially creates a situation where a new employee is placed on award conditions whilst other employees are working under more flexible and generous arrangements such as time off in lieu of overtime, and have access to family friendly leave. A strategy could be adopted whereby new employees are offered *flexible* employment conditions after the probationary period of employment.

Analysis

The Commission has achieved the legislative aim of setting a safety net of terms and conditions but the model awards are not by any measure in a form that " *promote flexible modern work practices and efficient and productive workplaces.*" They are essentially no more than a codification of award conditions that were generally applicable prior to the Workchoices amendments to awards in 2006.

In many instances the modernised award will increase the costs of employment for employers. The retail industry has spent ten years progressively bargaining away the prohibitive penalty rates applicable on weekends only to see them reintroduced by the Commission.

The failure of the Commission to incorporate annualisation and packaging of salaries in the model awards as well as cashing out annual leave forces employers and employees to enter into costly enterprise agreements to give legal effect to these arrangements.

One of the greatest disappointments of this process has been the Commission's failure to tackle the outdated job classification structures of federal awards. The modern awards are supposed to be simple to understand and easy to apply. Most award classification descriptions bear little or no relationship to modern workplace roles. Further, the approval of enterprise agreements under the '*Better off overall test*' is contingent upon a comparison with applicable award rates of pay. Employers that have already modernised job classifications in their own workplace or certified agreements will have great difficulty in matching modern jobs in their businesses with the grossly inadequate job descriptions in awards.

The paper work associated with the award flexibility agreements will also impose additional administrative burdens on small to medium enterprises.

The upside for employers is that leave entitlements such as personal and carers, annual, parental, long service and public holidays will be uniformly prescribed in the National Employment Standards rather than modern awards.

The 17 priority industries and occupations that have modernised awards are:

- Catering industry, liquor and accommodation industry, restaurants
- Clothing industry (including footwear manufacturing), textile industry
- Coal mining industry

- Higher education industry
- Metal and associated industries, glue & gelatine, rubber, plastic & cable making, vehicle manufacturing
- Mining industry
- Private sector clerical occupation
- Racing industry
- Rail industry
- Retail industry
- Security industry

Employers that compete in one or more of these industries should read the applicable [modernised award](#) and assess the impact on their businesses. Contact [Maguire Consulting](#) to discuss how you should respond to the issues that will affect your business.

Fair work bill continues its journey through parliament

On 25 November 2008, the Senate referred the provisions of the Fair Work Bill 2008 to the Senate Standing Committee on Education, Employment and Workplace Relations for report by 27 February 2009.

Public hearings are to be held in Melbourne, Sydney and Canberra during the week commencing 16 February 2009. It is expected that the Bill (whether amended or not) will pass into law during this autumn session of the Australian Parliament.

Read Employee Relations MONTHLY Christmas 2008 edition for a summary of the main provisions or read the Bill and Second Reading Speech on the [Parliamentary website](#)

2009 Minimum wage review

The Australian Fair Pay Commission is inviting written submissions from interested groups and individuals in the lead-up to its 2009 Wage-Setting Decision. Submissions close Friday 20 March 2009.

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The industrial relations landscape is set to change and all employers will have to manage employment obligations under a new, tougher regulatory environment in 2009.

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AROUND THE STATES - What's making news in State jurisdictions?

New South Wales

IR Workshops for 2009

The NSW Office of Industrial Relations has published the calendar of workshops for the first half of 2009. The Office offers a range of free and paid practical workshops designed to help employers understand their obligations and apply good employment practices.

[\[More\]](#)

Victoria

Family responsibilities – New guidelines

Changes to Victoria's Equal Opportunity Act mean that employers must consider any request for flexible work arrangements from staff members who have children or people who depend on them for care. The new laws come into effect on 1 September 2008.

The Victorian Equal Opportunity & Human Rights Commission and Industrial Relations Victoria have developed guidelines that provide details of the amendments, offer answers to common questions asked by employers and employees, and include a model process that employees and employers can use to make and consider requests for changes to work arrangements.

[\[More\]](#)

Changes to Police Check procedure

The Victoria Police have made changes to the Police Checking process. New forms and instructions are now available.

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Queensland

Building industry RDO

The 2009 list of rostered days off for the Queensland building industry has been published.

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Western Australia

2009 Equal Opportunity Commission Training Calendar

A list of courses available for the first half of 2009, with information on how to register has been published by the WA EOC

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South Australia

Information sheets

The South Australian government has published a set of information sheets explaining various topics related to the management of employee relations.

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